IN THE

Supreme Court of the United States

October Term, 1978

NO. 78-354

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE A BRIEF, AMICI CURIAE, AND BRIEF AMICI CURIAE, IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., NORTH CAROLINA ASSOCIATION OF CHIEFS OF POLICE INC., NORTH CAROLINA DISTRICT ATTORNEYS ASSOCIATION, INC., NORTH CAROLINA POLICE EXECUTIVES ASSOCIATION, INC., NORTH CAROLINA ASSOCIATION OF POLICE ATTORNEYS, INC., NORTH CAROLINA SHERIFFS ASSOCIATION, INC.

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MOTION FOR LEAVE TO FILE BRIEF, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

Comes now Americans For Effective Law Enforcement, Inc., North Carolina Association of Chiefs of Police, Inc., North Carolina District Attorneys Association, Inc., North Carolina Police Executives Associations, Inc., North Carolina Association of Police Attorneys, Inc., North Carolina Sheriffs Association,, Inc., who respectfully move this Court for leave to file a brief amici curiae in support of the petitioner. Counsel for

petitioner, the State of North Carolina has consented in writing to our filing and a letter to this effect has been lodged witht he Clerk of the Court. Counsel for respondent, Butler, has denied our request for consent to file. Accordingly we are moving the Court for leave to file. The interest of the amici and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2, To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The North Carolina Association of Chiefs of Police, Inc.; the North Carolina District Attorney's Association, Inc.; the North Carolina Police Executives Association, Inc.; the North Carolina Sheriff's Association, Inc. are all non-partisan, non-political, non-profit organizations whose purpose is to represent the professional law enforcement and prosecutorial officers of the State of North Carolina.

The constituency of each organization is represented in the name of each organization and each organization has, as its common purpose professionalism in the administration of justice through mutual cooperation and exchange of information among its members.

Amici believes this case to be of paramount importance for the State of North Carolina, and nationally. Since Miranda v. Arizona, 384 U.S. 436, was decided in 1967 there has been a growing controversy over its effect on the effectiveness of law enforcement. It is the position of amici that the rigid and inflexible strictures placed upon law enforcement officers and prosecutors by the Miranda decision, particularly as interpreted by some lower courts, have had a deleterious effect upon law enforcement. This case presents this Court with an opportunity to examine the question whether the inflexibility of Miranda should be modified to include a test of the totality of circumstances in determining the validity of waiver of counsel. Thus, the case is of major importance to those who are concerned with the effectiveness of the law enforcement process.

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ARGUMENT

Amici will not reiterate the legal arguments made by the State of North Carolina, although we

agree with them and wish to associate ourselves with them. We will confine our argument to certain policy issues raised by the question presented by this case.

I. THIS COURT SHOULD ADOPT A "TOTALITY OF CIRCUMSTANCES" TEST IN DETERMINING WAIVER OF THE RIGHT TO COUNSEL.

The question presented by this case is:

> Does federal law prohibit trial judge from finding implied waiver, under totality of circumstances approach, of right to counsel by fully warned defendant who made no specific affirmative oral or written waiver of right to counsel but nonetheless made allegedly voluntary inculpatory statement? 12 Cr. L. 4188, December 13, 1978.

We cite in full the question presented only to place it in juxtaposition with, and to call attention to, the striking similarity between the question presented and the "totality of circumstances" rule for testing waiver of counsel which was suggested by Mr. Justice Clark in his dissenting opinion in Miranda v. Arizona, 384 U.S. 436:

> Under the 'totality of circumstances' rule...I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court wuld appoint one at his request if he was too poor

> to employ counsel. In the absence of counsel the burden would be on the state to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary. 384 U.S. at 503. (emphasis supplied.)

This case presents the Court with the opportunity to adopt the flexible test suggested by Justice Clark, as opposed to the inflexible strictures of Miranda, and we urge the Court to do so, for the following reasons.

A. THE INFLEXIBLE, PER SE RULES ENUNCIATED IN MIRANDA V. ARIZONA HAVE RESULTED IN LOWER COURT INTERPRETATIONS WHICH SUPPRESSED OTHERWISE VOLUNTARY CONFESSIONS, AND HENCE THE TRUTH, IN THE CRIMINAL JUSTICE PROCESS.

This is but another in a line of cases in which lower courts, confronted with the rigid and inflexible language of the majority holding in Miranda, have interpreted that decision in such a way as to require suppression of confessions and admissions which, by any other standard, would have been found to be completely voluntary.

We discussed the problem of the rigidity of Miranda in a brief, amici curiae, filed in December of 1978 before this Court in the case of Fare v. Michael C., No. 78-332, October Term, 1978;[1] consequently we

[1]/Amici were: Americans for Effective Law Enforcement, Inc. (co-amicus in this case) and the California District Attorneys Association, Inc.

will not reiterate our arguments at any length in this brief.

Suffice it to say that such lower court interpretations have been made; and, some of them, as noted by Mr. Justice Rehnquist in his opinion staying the mandate in Fare v. Michael C., supra, have "...evinced no principled limitations."[2]

These cases have turned on such matters as the language used in the Miranda warnings, questions of waiver, and other technical points;[3] but the holding in each case can be traced back to the inflexible, per se rules which Miranda laid down.

To be sure, this Court has consistently refused to extend the Miranda doctrine beyond its original limits;[4] and, indeed, it has prohibited lower courts from making such extensions based upon their own interpretations of the Federal Constitution, at least in those areas in which this Court has "specifically refrained" from extending them.[5] However, this Court can make definitive rulings "specifically refraining" from extending Miranda in only a very

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[2]/We do not suggest for a moment that the Supreme Court of North Carolina was evincing an unprincipled interpretation in the instant case. To the contrary, a reading of the lower court's opinion indicates clearly that it felt compelled to reach the result that it did precisely because of the inflexibility of the language of Miranda.

[3]/See, e.g.: Commonwealth v. Singleton, 439 Pa. 185, 266 A.2d 753 (1970); Biggerstaff v. State, 491 P.2d 345 (Okla. App. 1971); Scott v. State, 251 Ark. 918, 475 S.W.2d 699 (1972); United States v. Millen, 338 F. Supp. 747 (E.D. Wisc. 1972); DuPont v. United States, 259 A.2d 355 (D.C. App. 1969); In re Michael C., 21 Cal.3d 471; 146 Cal. Rptr. 358 (1978).

[4]/Harris v. New York, 401 U.S. 222 (1971); Michigan v. Tucker, 417 U.S. 433 (1974); Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Mathiason, 429 U.S. 492 (1977).

[5]/Oregon v. Hass, 420 U.S. 714 (1975).

limited number of cases.[6] For this reason, we submit that the time has come for the Court to make a general ruling in this case, away from the rigidity of Miranda and towards the "totality of circumstances" test enunciated by Mr. Justice Clark, supra, P. 6.

B. THIS CASE PRESENTS A CLASSIC EXAMPLE OF ALL OF THE REASONS WHY THE RIGIDITY OF MIRANDA SHOULD BE MADE MORE FLEXIBLE.

Three elements are almost invariably present in cases such as this one; and, we submit, these elements dictate the return to the totality of circumstances doctrine discussed above. We will discuss each element briefly.

1. The Factual Guilt of the Defendant is Not Really in Question.

In this case, for example, there is overwhelming evidence of the guilt of the defendant. He was positively identified by the victim of the robbery and attempted murder, and his statements made to the F.B.I. agent indicated knowledge of and participation in a most heinous crime: the armed robbery and attempted murder, by shooting, of an unarmed, innocent victim, resulting in the partial paralysis of that victim.[7]

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[6]/As Mr. Justice Rehnquist noted in his opinion staying the mandate in Fare v. Michael C.:

"This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on Miranda and related cases, and, with many issues that recur in petitions before this Court, we decline most such tenders." _____U.S. _____, 99 S.CT.3, at 5. (1978)

[7]/Taking the stand in his own defense, Butler, of course, denied participation in the crime or making inculpatory statements. The jury, however, chose to disbelieve him.

If the holding of the North Carolina Supreme Court is upheld however, Butler's statements indicating his guilt of this crime must be suppressed. Guilt, in effect, become irrelevant. The history of the Fifth Amendment is not consistent with the "irrelevance of guilt" theory which is inherent in Miranda.

The dissenting Justices in Miranda pointed out that the decision flew in the faces of prior precedent, and their contention was not seriously challenged by the majority.[8] Mr. Justice White, for example, characterized the ruling as:

> ...neither compelled nor even strongly suggested by the language of the Fifth Amendment, [and] is at odds with American and English legal history... 384 U.S., at 531.

Nor did the framers of the Bill of Rights have in mind the single-minded protection of the guilty. Rather, that amendment was enacted in order to ensure that no innocent parties were convicted by confessions extorted by Star Chamber tactics, torture, threats or other forms of coercion.

Nevertheless, the historical prespectives of the Fifth Amendment have been radically changed by Miranda. A United States District Judge, in reversing a conviction based on a Miranda "violation," summed up the current situation with admirable candor, stating that the focus of the Fifth Amendment had:

> ...been broadened from protecting the innocent from the possibility of a false confession to protecting the guilty from unfair methods of pro-

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[8]/Indeed, the majority in Miranda acknowledge that: "In these cases we might not find the defendant's statements to have been involuntary in traditional terms." 384 U.S. at 457.

curing statements from him. (emphasis supplied).[9]

The key word in this quotation is, of course, the word "unfair." Certainly, torture, threats, promises of leniency and so on, are "unfair" methods of obtaining statements, principally because such interrogation techniques could cause an innocent person to confess; and statements so obtained should properly be suppressed.

Miranda, however, dictated a set of new and inflexible prophylactic rules defining "unfairness" in terms excluding confessions obtained by methods which, until Miranda, would have been considered perfectly "fair." Under Miranda the realities of the situation are ignored and, if the rigid, per se rules have been contravened, any statements made must be suppressed, whether they were made voluntarily or not. It is precisely these rules which serve only to protect the guilty. Certainly this is the situation from all appearances in this case.[10]

The fact that patently guilty individuals will have their otherwise voluntary confessions suppressed, and often be freed, because of Miranda exacts a heavy toll upon society, one which was forcast by Mr. Justice White, dissenting in that case:

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[9]/U.S. ex rel. Chabonian v. Leik, Director, 366 F. Supp. 82 (E.D. Wis. 1973).

[10]/While it is true that the Supreme Court of North Carolina stated that: "...there is other evidence amply sufficient to support a conviction in this case..." (244 S.E.2d, at 413), we submit that this is not the point. First, much evidence in criminal cases is relatively ephemeral: witnesses may die or become otherwise unavailable, or their memories may falter after the lapse of many years. Thus, it cannot be said with certainty that in this case Butler could successfully be retried. Of far more importance, however, is the effect of such rulings on other cases where the defendant could not successfully be retried without the use of the suppressed statements. Thus, insofar as the importance of this case is concerned, it is completely irrelevant whether Butler could be successfully retried or not.

> There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.
>
> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. 384 U.S. at 542.

Mr. Justice White's prophesy has proven to be completely accurate: guilt, in many cases has become irrelevant and the truth in the criminal justice fact-finding process has been suppressed.

2. <u>There Is No Evidence Whatever of Coercion On The Part of the Government Officer.</u>

Although the quotation from the District Court opinion, noted above at P.10, spoke of "unfairness" in the process of obtaining statements from criminal suspects, it is difficult to discern what unfairness took place in this case.

F.B.I. Special Agent Martinez arrested Butler in New York and immediately and fully advised him of

his constitutional rights. The Agent transported Butler to the F.B.I.'s New Rochelle office and again advised him of his rights. Butler read the "Advisement of Rights" form and stated that he understood his rights. He agreed to talk with the Agent but refused to sign the form. He did not ask for an attorney.

There is no evidence in the record of any kind of physical or phychological coercion, nor of any trickery or deceit. Moreover, there is not the slightest indication of any tactics used which would cause an innocent person to confess. The record is relatively straightforward: the subject was advised verbally of his rights (twice) and read and understood the "Advisement of Rights" form. He refused to sign the form, or anything else for that matter, but he agreed to talk with the Agent and did talk with him, making inculpatory statements.

Thus any "unfairness" in this case must stem from the fact that the F.B.I. Special Agent ran up against the stone wall of the per se Miranda rules, at least as the Supreme Court of North Carolina interpreted them; by any other standard his actions as an interrogator of a criminal suspect cannot be faulted.

3. Butler's Statements Were, By Any Objective Standard, Voluntarily Made.

Butler's refusal to sign the "Advisement of Rights" form concedely forecloses any contention that he made a written waiver of his right to counsel.

The Supreme Court of North Carolina, in addition, held that since Butler made no express oral waiver of counsel his statements must be suppressed. The lower court relied principally on the

language in Miranda that waiver will not be presumed unless "specifically made":

> No effective waiver of the right to counsel during interrogation can be given unless specifically made after the warnings have been given. 384 U.S. at 470 (emphasis supplied).

This is one of the more rigid and restrictive paragraphs in Miranda; there is no flexibility in it whatsoever. When language such as this is applied to cases like this one, logic and commonsense break down.

It is relatively clear from the record that Butler understood his rights, including his right to an attorney. He had been advised, verbally of his rights (twice), had read the advisement form, and told the F.B.I. Agent that he understood them.

Miranda, as interpreted by the North Carolina Supreme Court, presumes that Butler's statements were involuntarily made, and therefore inadmissible, because no express waiver of counsel was "specifically made." The question now before this Court is whether, in the totality of circumstances, the trial judge must be prohibited from finding implied waiver.

Special Agent Martinez' testimony regarding this matter, while given somewhat ingenuously, is a masterpiece of common sense as opposed to per se rules:

> He never told us that he did not want the lawyer present. He never told us that he did want a lawyer present. ...He said, "I won't sign the form. I will talk to you but I won't sign the form." What made me believe that he did not want a lawyer present at that time was the fact that he

was relating the story concerning the charges against him at that point. If he wanted an attorney present with him he wouldn't have said anything. 244 S.E.2d at 412.

We cannot conceive of a more clear-cut case where, in the totality of circumstances, a confession would be found to be voluntary.

The question then is squarely before this Court: must the inflexible language of Miranda control in every case involving waiver, or should the totality of circumstances rationale, suggested by Mr. Clark, supra p. 6 be adopted? We submit that, at least in cases such as this one, in which 1) there is little or no doubt of the suspect's factual guilt; 2) there is no evidence of coercion; and 3) the statements made were by any objective standard voluntary, the totality of circumstances doctrine should be adopted.

II. INTERROGATION OF CRIMINAL SUSPECTS IS ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT AND SHOULD NOT BE FRUSTRATED BY OVER-RIGID, PROPHYLACTIC RULES.

Each of the dissenting Justices in Miranda commented, directly or indirectly upon the necessity for criminal interrogation in the law enforcement process.[11] Writers on the subject have also described the problems which arise if custodial interrogation

[11]/"Custodial interrogation has long been recognized as 'undoubtedly an essential tool in effective law enforcement'." 384 U.S. at 501, Clark, J., dissenting.

"What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it." 384 U.S., at 516. Harlan, Stewart and White, J.J., dissenting.

is banned, or so severely limited as to become ineffective:

> One completely false assumption accounts for most of the legal restrictions on police interrogations. It is this... whenever a crime is committed, if the police will only look carefully at the crime scene they will almost always find some clue that will lead them to the offender and at the same time establish his guilt; and once the offender is located, he will readily confess or disclose his guilt by trying to shoot his way out of the trap. But this is pure fiction; in actuality the situation is quite different. As a matter of fact, the art of criminal investigation has not developed to a point where the search for and examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary proof of his guilt. In criminal investigations even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information.[12]

Finally, Mr. Justice Black, who was, of course, a majority Justice in Miranda, nevertheless stated, in another context, one of the most succinct summations of the problem ever made:

> It is always easy to hint at mysterious

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[12]/Inbau and Reid, "Criminal Interrogations and Confessions," Second Ed., Baltimore, Md., Williams and Wilkins, Co., 1967, P. 213.

means available just around the corner to catch outlaws.[13].

We do not wish to belabor the point that custodial interrogation is an essential concomitant of effective law enforcement, but rather to point out the extent to which good-faith efforts to enforce the law can be frustrated if the strictures placed upon them are sufficiently inflexible.

As Mr. Justice Rehnquist noted in his opinion staying the mandate in Fare v. Michael C., proponents of the Miranda decision have claimed that rigid, per se rules give the police clear-cut guidance in cases dealing with confessions.[14] Such a contention might well be accurate if we were dealing with an area less difficult than the enforcement of the criminal law; but we are not.

Law enforcement is a volatile business. No two situations can ever be the same in the confrontation between the policeman and the criminal because all are human beings, subject to the vicissitudes of human nature. There are, and should be, rules which police officers are required to observe, and we believe that most officers do attempt to comply with the rules which circumscribe their conduct; but the innumerable factual variations which can arise in any law enforcement-related situation militate against the application of the sort of wholly inflexible, per se rules which Miranda created.

The case in point presents an excellent example. The officer involved was an agent of the Federal Bureau of Investigation, who we may assume, was as well-trained, if not better-trained, than most law

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[13]/ Berger v. New York, 384 U.S. 41, at 73 (1967), Black, J. dissenting.

[14]/ _____U.S. _____, 99 S. Ct. 3, at 5, (1978).

enforcement officers in the country. He engaged in no coercive tactics; and, as he testified, he believed that everything that he did, insofar as the questioning of Butler was concerned, was perfectly proper. Now, the lower court has held that he ran afoul of the no-waiver-unless-specifically-made language of Miranda. Agent Martinez' good faith efforts to enforce the law have thus been frustrated.

A majority of this Court addressed this point in Michigan v. Tucker:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error therefore, we should consider whether the sanction serves a valid and useful purpose. 417 U.S. 433, at 446 (1974).

If the holding of the lower court were to be affirmed, we would indeed be "penalizing police error." In a broader sense, society would also be penalized, because the necessary, even essential, law enforcement technique of custodial interrogation, without coercion and which elicited voluntary inculpatory statements, would have been wholly frustrated. This is another reason for this Court to return to the "totality of circumstances" standard.

CONCLUSION

Prior to this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), the standard for

judging the admissibility of confessions was whether that confession was voluntarily made "in the totality of the circumstances." Miranda laid down a set of rigid rules under which lower courts have suppressed many confessions despite the fact that: 1) there was little doubt as to the factual guilt of the suspect; 2) no coercive tactics were used by the police; and, 3) the confession was voluntary by any objective standard.

This case presents this Court with the question whether the totality of the circumstances may be considered by lower courts in determining whether counsel was effectively waived by a criminal suspect.

We urge this Court to answer this question in the affirmative and to reverse the judgment of the Supreme Court of North Carolina.

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